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In The Supreme Court of the United States

GALE NORTON,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA, NEW MEXICO, NEW YORK, OKLAHOMA, OREGON, SOUTH DAKOTA AND WISCONSIN IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the federal courts have jurisdiction to enforce specific congressional mandates for the management of federal lands by the Bureau of Land Management, where a failure by the Bureau to carry out those mandates and its own land use plans threatens irretrievably to compromise the very values that Congress intended to protect.

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INTEREST OF AMICI CURIAE

The federal government is far and away the largest landowner in the nation. Of the roughly 2.27 billion acres of land in our nation, the federal government owns and controls approximately 674 million acres, or about twenty-nine percent. U.S. Census Bureau, *Statistical Abstract of the United States: 2003* 226 Table No. 360. In California, the federal government owns and controls forty-seven percent of the state's land. *Id.* Four other states – Alaska, Nevada, Utah and Idaho – have more than sixty percent of their land under federal control; while three more states – Arizona, Oregon and Wyoming – have more than forty percent of their land under federal control. *Id.* All States contain some federally owned land. *Id.* Moreover, the importance of individual federal holdings to the host states is often disproportionate to the holdings' size. National parks and national monuments, for example, are commonly signature features in a state's identity, while national forests, as well as public lands owned by the Bureau of Land Management ("BLM"), often provide the bulk of a state's natural resources and are central to the state's environmental and economic health.

Amici States have two sets of vital interests at stake in this litigation. First are the States' interests in the proper management of federal public lands. Two types of BLM land are at issue in this case, each of which is representative of lands owned and controlled by federal land agencies in general. Second are the States' interests in federal agencies' compliance with specific congressional mandates. In this litigation Plaintiffs seek to enforce BLM's duty to comply with three distinct statutory obligations, each protecting different interests.

The first category of BLM lands at issue in the case are the particularly precious and irreplaceable Wilderness Study Areas (WSA's), areas that are reasonably, sometimes almost completely, undisturbed and free of human alteration, lacking roads, mines, houses and other indicia of human presence, but abundant with wildlife, natural plant communities, open vistas, silence and solitude.[1] Congress directed BLM to identify these lands and protect their wilderness qualities until Congress decides whether to designate and protect them as permanent wilderness. Federal Land Policy and Management Act ("FLPMA"), section 603(a), 43 U.S.C. §§ 1701, 1782(a). Pending congressional action, WSA's are subject to what BLM refers to as FLPMA's "non-impairment mandate:" BLM must manage each WSA so it remains suitable for designation as permanent wilderness. *Id.* § 1782(c). The non-impairment mandate preserves the ability of Congress –

[1] The WSA's comprise huge segments of the lands of many of the States. Examples include:

In California:	631,848 acres of which the Secretary recommended 91,852 acres as suitable for wilderness designation.
In Colorado:	593,541 acres of which the Secretary recommended 242,915 acres as suitable for wilderness designation.
In Idaho:	1,327,641 acres of which the Secretary recommended 567,457 acres as suitable for wilderness designation.
In Nevada:	3,819,727 acres of which the Secretary recommended 1,390,662 acres as suitable for wilderness designation.
In Oregon:	2,641,365 acres of which the Secretary recommended 1,186,681 as suitable for wilderness designation.
In Utah:	3,226,266 of which the Secretary recommended 1,934,137 acres are recommended as suitable for wilderness designation.

Data from the Wilderness Society.

and the abilities of the States through their congressional delegations – to designate wilderness areas. In other words, at issue here is the States' interests in having wilderness protected within their borders. Although the WSA's at issue in this litigation are all under BLM control, similar issues could arise for WSA's under the control of other federal agencies or for rivers eligible for designation as wild and scenic.

The second category of lands at issue in this case includes essentially all land under BLM control. Congress, through FLPMA, directed BLM to prepare and follow land use plans for all land under BLM's control. 43 U.S.C. §§ 1712(a), 1732(a). The BLM lands and the governing land use plans are representative of most federal land in the nation, including lands managed by the Forest Service, the National Park Service and the Fish and Wildlife Service, in that each federal land agency must manage its land in accordance with land use plans that it prepares and adopts. These land use plans not only ensure that the agency will manage the land in a proper and thoughtful manner, they help protect the host states' interest in the lands, whether those interests be commercial, recreational or conservationist in nature. In FLPMA, Congress recognized the state interest in the management of federal land and directed BLM to coordinate its land use planning and management with the planning and management activities of state and local governments. 43 U.S.C. § 1712(c)(9). Further, to the extent that a state's direct sovereign powers may be impaired on federal land, that state has a particular interest in how the federal agency manages their lands.

Parallel to the types of land at issue in this litigation are the three congressional mandates involved. First is

BLM's "non-impairment duty" to manage each WSA so it remains suitable for designation as permanent wilderness. Plaintiffs allege that off-highway vehicle use on four specific WSA's is impairing the wilderness suitability of those WSA's and that BLM is thereby breaching the non-impairment mandate. In this litigation, because BLM has admitted impairment – the very outcome Congress sought to preclude – the States' interest in continued federal court jurisdiction does not turn on the ultimate merits of Plaintiffs' claim. Rather BLM's petition raises the possibility that states will not have redress to the federal courts even when a federal agency has admitted that it has not accomplished – and will not accomplish – a mandatory, non-discretionary duty.

The second duty at issue here is BLM's obligation (similar to that of the other federal land management agencies) to prepare and follow land use plans. 43 U.S.C. § 1712(a). Land use plans are the tool Congress has provided not only to manage the public lands, but also to protect the States' interests as neighbors and hosts to the federal lands. *Amici* States must be able to rely on these commitments when doing their own land use planning and resource allocation. And they must be able to seek the assistance of the federal courts to compel the federal land management agency to carry out the land use plans it has duly adopted. At issue in this case is not only the States' ability to protect their residents' interests in federal lands through the statutory federal land use planning process, but also the ability of the federal courts to protect the integrity of that process itself.

Third, in the National Environmental Policy Act ("NEPA," 42 U.S.C. § 4321 et seq.), Congress empowered

the federal courts to ensure that federal agencies are proceeding in a thoughtful manner and that the agencies at least consider environmental values in the decisions they make and the actions they take. 42 U.S.C. § 4332. State interests will be protected only if federal land agencies regularly determine if changed circumstances have rendered their land use plans out of date. Acceptance of BLM's position that it cannot be compelled even to take a hard look at whether changed circumstances have cause changed environmental consequences on environmentally priceless public lands, could result in closed, nonpublic decisions-by-default. The States cannot carry out their own land management responsibilities without the information that, through NEPA, Congress intended them to have, and that BLM would deny them. Again, at issue in this litigation is not only the states' ability to take advantage of an essential process, but also the ability of the courts to protect the integrity of that process itself.

The States thus have distinct interests in the proper management of wilderness-quality lands, such as BLM WSA's, and in the proper management of all federal public land, such as BLM lands in general. Similarly, the States have distinct interests in continued federal court jurisdiction over mandatory, non-discretionary duties such as the non-impairment duty, a federal agency's compliance with the agency's own regulations and binding plans, and federal agency compliance with procedural statutes such as NEPA.

If accepted by the Court, BLM's contention that the federal courts do not have jurisdiction over any part of this case would cause disturbing consequences for the States. BLM would have it that the federal courts, and therefore

the States, are powerless to compel that agency to manage wilderness study areas in a manner that prevents degradation of the very characteristics for which they were designated WSA's in the first instance. BLM would further have it that the federal courts have no jurisdiction to compel the BLM to comply with the land use plans it has adopted or to determine if those plans must be updated. BLM thus contends that its – and its sister agencies' – stewardship responsibilities over federal lands, including WSA's, are largely immune from judicial scrutiny.

BLM's contention is untenable and wholly dismissive of legitimate and substantial state interests in the preservation of these vital and irreplaceable resources.

SUMMARY OF ARGUMENT

In 1982, then Assistant Attorney General Theodore Olson with the Office of Legal Counsel, wrote "One of the express congressional purposes for the FLPMA was to reassert Congress' control over federal lands. . . ." *Presidential Authority over Wilderness Areas under the Federal Land Policy and Management Act of 1976,* 6 U.S. Op. Off. Legal Counsel 63, 71 (1982) (1982 WL 170671 (O.L.C.)). To assert that control, Congress established specific directives for federal land management, including the three statutory mandates at issue here.

Each of the three statutory duties involved in this case imposes specific requirements; contrary to BLM's arguments, none is a "general statutory standard." These statutory mandates are not ambiguous and do not grant to BLM the discretion to decline to follow them or to

implement them only in a limited, half-hearted manner. Nor, contrary to BLM's solipsistic arguments, does this case concern merely BLM's "day-to-day" management of federal lands, or purely discretionary BLM duties.

Rather, as the Tenth Circuit recognized and articulated, the complaint alleges that BLM has violated three separate non-discretionary statutory mandates by failing to implement and comply with those mandates at nine specific locations. The case is not before the Court on the merits; the petition here raises only the question of whether the federal courts have jurisdiction to review the particular failures to follow specific congressional mandates and BLM's own adopted and binding land use plans, and to order the required actions that explicitly appear in those statutes and plans.

Because the States' powers as independent sovereigns may be preempted on federal lands, it is of paramount importance to the States that the federal courts be available to protect any state interests that the States cannot directly protect themselves. *Amici* States believe that the federal courts do have, and always have had, jurisdiction to review federal agency action – and failure to take action – that defies clear statutory and regulatory standards. To rule otherwise would render this Court and the inferior federal courts powerless to enforce federal statutes in any instance where the federal agency could portray its noncompliance as an error of omission, rather than commission, and powerless to compel any federal agency act that was not on the short and crabbed list of formal agency actions, such as permits, sanctions, and rule-makings, that BLM presents. BLM Merits Brief at 13-14. This ruling would be improper in any context, it would be particularly so in the context of public lands where, because states may

not have their full sovereign powers, they must rely on BLM to protect their interests.

The federal courts have jurisdiction over each of three causes of action before the Court. First, federal courts have jurisdiction to hear Plaintiffs' claim that BLM is out of compliance with the non-impairment mandate for WSA's. They have this jurisdiction because Congress directly imposed on BLM a nondiscretionary duty to preserve WSA's from impairment. Even assuming, *arguendo*, that Congress left BLM discretion to select what actions to take to *prevent* impairment, Congress did not grant BLM discretion to *allow* impairment; BLM's duty to prevent impairment is mandatory, nondiscretionary, and directly imposed by Congress.

Second, BLM's duty to comply with its own duly adopted land use plans is a statutory and regulatory requirement; the FLPMA provisions concerning land use planning for federal lands, and BLM's own implementing regulations, both show that BLM is obliged to comply with commitments it makes in duly adopted land use plans. BLM's contention that the provisions of its land use plans are unenforceable simply has no support in the text of the statute and regulations.

Lastly, NEPA imposes procedural requirements that federal agencies must follow when they take actions that may harm the environment, procedural requirements over which the federal courts unquestionably have jurisdiction and that the federal courts routinely enforce. NEPA mandates that federal agencies take a "hard look" at changed circumstances affecting ongoing projects. In this instance and others, the parties may disagree about whether the mandate applies, but regardless of the

eventual disposition of the merits of the case, the federal courts have jurisdiction to make the determination.

The analysis of the Tenth Circuit was reasonable and correct. The judgment should be affirmed.

ARGUMENT

I. THE NON-IMPAIRMENT MANDATE IMPOSES ON BLM A MANDATORY, NON-DISCRETIONARY DUTY, IN THE MANAGEMENT OF WILDERNESS STUDY AREAS, TO ENSURE AGAINST DEGRADATION OF THOSE AREAS PENDING DECISION BY CONGRESS; BLM'S FAILURE TO CARRY OUT THAT DUTY IS COGNIZABLE BY THE FEDERAL COURTS.

The Court's observations in *Abbott v. Gardner*, about the Administrative Procedure Act, 5 U.S.C. § 701 ("APA") should guide the Court's review of BLM's arguments in this matter. *Abbott v. Gardner*, 387 U.S. 136 (1967). First, there is a "basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' so long as no statute precludes such relief or the action is not one committed by law to agency discretion." *Id.* at 140 (citations omitted). Second, "the cases dealing with judicial review of administrative actions have interpreted the 'finality' element *in a pragmatic way*." *Id.* at 149. (Emphasis added.) *Amici* States have a profound interest in the APA's guarantee of a public process and urge the Court to rule accordingly.

BLM argues that, under the APA, only discrete and final agency action may be reviewed by the federal courts. *Amici* States urge the Court to continue to interpret "finality" in the context presented here, in the "pragmatic way" endorsed by the Court in *Abbott*. Allowing a WSA to lose the very wilderness values that are required to support a designation as permanent wilderness *is* final action as to that Wilderness Study Area. The practical effect of BLM's proposed interpretation would be that a WSA could become disqualified for designation as wilderness even though there had been no formal agency action that BLM would recognize as "final" and reviewable. To deny jurisdiction until the threatened damage becomes permanent would be to render any subsequent judicial review of the alleged agency noncompliance an exercise in futility.

BLM argues that the federal courts' jurisdiction under APA section 706(1) is limited such that it allows a federal court to compel only those final agency actions that could be reviewed under section 706(2). BLM's position, echoed by amicus Pacific Legal Foundation, sharply contrasts with the *Abbott* presumption of reviewability. The argument, moreover, lacks support in the statute. First, the definition of "agency action" is expansive and open-ended. 5 U.S.C. § 551(13). The statute uses the wording "Agency action *includes*. . . ." indicating that the list is not a complete and exhaustive one. *Id.* Further "order," one of the types of agency action is itself defined expansively. *Id.* § 551(6). Second, "agency action" explicitly includes a "failure to act." *Id.* § 551(13). The illusory precision of BLM's proposed interpretation of "agency action" is inconsistent with the statute's very expansive definition of that term. To adopt BLM's proposed rule would enable

administrative agencies to ignore all but the most specific congressional mandates without fear of judicial review. Congress could exercise its Constitutional role only by designing statutes with long and detailed lists of tasks, deadlines, definitions, and other provisions to ensure that agency duties were completely spelled out and that all duties were formal and involved "final" action as BLM defines it. The rule BLM proposes would hamstring Congress and require it to perform detailed work that our system properly contemplates will be done by administrative agencies, subject to judicial review.

Of course, judicial review of agency inaction cannot be unbounded. Courts have subject matter jurisdiction only to review those agency duties that are both mandatory and nondiscretionary. Those are precisely the kind of duties that Plaintiffs allege were violated here.

A. Congress Adopted FLPMA Section 603 to Reserve for Itself the Opportunity to Designate Additional Wilderness Lands.

When Congress adopted FLPMA in 1976, it did so to reassert control of the nation's public land. Wilderness preservation was one of Congress' specific objectives, legislating that certain public lands should be "managed in a manner that . . . will preserve and protect [them] in their natural condition." 43 U.S.C. § 1701(a)(8). To that end, Congress retained for itself the task of evaluating *all* wilderness-suitable land in the nation and choosing which lands to designate as *wilderness*, 43 U.S.C. § 1782, thereby invoking the Wilderness Act's powerful and poetic conception that wilderness should "retain its primeval character and influence . . . affected primarily by the forces of nature [and offering] outstanding opportunities for solitude or a

primitive and unconfined type of recreation." 16 U.S.C. § 1131(c).

Recognizing the significance and enormity of the task it had set itself, Congress directed the President and the Secretary of the Interior to commence the multi-year, ongoing project of inventorying all of the nation's public lands and recommending to Congress which lands the President believes should be preserved as wilderness. Congress' extraordinary choice in 1976 to assign such substantial tasks to itself and to the President, without the option of delegating the choice of wilderness lands to any administrative agency, reflects the importance that Congress placed on our nation's remaining wilderness lands.

FLPMA, and the earlier Wilderness and Wild and Scenic Rivers Acts[2] reflect a fundamental determination by Congress, that certain natural resources – river, desert or forest – though not yet formally protected as wilderness or wild and scenic, are so precious that their federal agency stewards must watch over them and preserve their wildness until Congress, or in some instances a state legislature, can determine whether to afford them permanent protection. Congress recognized that in the normal course

[2] In FLPMA section 603, Congress built upon the inventory-and-designation approach it had taken in 1964 with the Wilderness Act. 16 U.S.C. § 1132. *See generally Parker v. U.S.*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). Congress also followed this approach with its determination in the Wild and Scenic Rivers Act that rivers which "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. §§ 1271, 1275.

of development more and more of our remaining wild rivers and lands would become "trammeled by man" and permanently lose their "outstandingly remarkable values" or "primeval character and influence." 16 U.S.C. §§ 1131, 1271. Therefore, in *FLPMA* after keeping for itself the final decision as to whether eligible lands would be put in the Wilderness System, Congress commanded BLM to preserve Congress' prerogative by maintaining, until Congress acted, the suitability of the lands for preservation as wilderness.

Congress has made plain its intent that the federal agencies, including BLM, are truly only stewards as to these lands. They must maintain the wilderness values of the lands, and prevent any impairment of those values, until Congress itself makes the decision as to the ultimate fate of the WSA's. BLM here asks the Court to surrender the jurisdiction of the federal courts to enforce BLM's compliance with what Congress obviously thought was a vital duty. *Amici* States ask this Court to carry out the will of Congress, and ensure that appropriate judicial oversight of BLM action and inaction in performing its congressionally assigned duty remains available.

B. Congress' Scheme Would Be Frustrated Were the Non-impairment Mandate Treated as less than a Mandatory, Nondiscretionary Duty That is Reviewable by the Federal Courts.

BLM argues that its compliance or noncompliance with the non-impairment standard should be beyond judicial review because BLM has multiple options for complying with that standard. In other words, BLM contends, because (BLM alleges) some of the *remedies*

proposed by Plaintiffs might invade BLM's legitimate discretion, the district court does not have jurisdiction to entertain plaintiffs' complaint at all. Likewise, BLM contends that if it has taken *any* measures with the ostensible aim of preventing impairment of the WSA's, *all* judicial review is proscribed as an invasion of its discretion. BLM, in effect, argues that any evidence of efforts at compliance with congressional mandates completely ousts the federal courts of jurisdiction to compel full compliance. Rather than the old argument about whether the glass is half-full or half-empty, BLM argues that if there are even a few drops of water in the bottom of its glass, the federal courts are required as a matter of law to treat the glass as full.

Significantly, there is no dispute here that off-highway vehicle use impairs WSA's; BLM has long conceded that it can. *See, e.g.*, U.S. Department of Interior, *Interim Management Policy and Guidelines for Lands under Wilderness Review*, 44 Fed. Reg. 72014, 72015 (1979) [hereinafter "1979 Interim Management Policy"] ("Based on past practice, it is expected that ORV events involving cross-country travel (off existing ways and trails) as part of the route would rarely satisfy the non-impairment criteria.") More importantly, BLM has conceded in this very case that the off-highway vehicle use that Plaintiffs challenge *has* caused impairment. Memorandum Decision and Order, *SUWA v. Babbitt*, USDC, D. Utah, 2000 WL 33914094, *5 (December 12, 2000) ("The BLM points out that it is well aware that ORV-caused damage is resulting from cross-country travel in these WSA's. . . . It is also

clear that BLM is aware of the impairment caused by ORV use. . . .")

1. Congress Did Not Delegate to BLM Discretion to Allow Impairment.

BLM's arguments misconstrue the nature of the tasks delegated to it by Congress. "[T]he first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers. . . ." *Whitman v. American Trucking Associations*, 531 U.S. 457, 464-65 (2001). Congress has directed BLM to prevent impairment of WSA's. BLM contends it has discretion to choose what actions to take to prevent impairment.[3] Even if that is so, Congress plainly did not delegate to BLM authority to determine whether to allow impairment. Peter Lehner, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 665 (1983). Here, BLM has admitted that the wilderness values of the WSA's in question are being impaired – but argues that there can be no judicial determination of whether that impairment is permissible; BLM

[3] In 1979 BLM suggested something different; BLM effectively acknowledged that non-discretionary obligations are implicit in the non-impairment mandate, in other words, that the non-impairment mandate gives rise to subsidiary, nondiscretionary duties. BLM recognized that it could not comply with the non-impairment mandate without procedures to evaluate impacts, monitor impacts, and keep records of impacts. 1979 Interim Management Policy, *supra*, 44 Fed. Reg. at 72022-23.

thereby claims for itself authority whether or not to allow impairment.

BLM's current position is not entitled to "*Chevron*" deference, *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), because BLM here has reversed a long-standing policy of the agency, and has not done so in a rule-making context, or with appropriate procedures. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30 (1987); quoting *Watt v. Alaska,* 451 U.S. 259, 273 (1981).[4]

Indeed BLM's current position directly conflicts with past agency policy. In 1979, BLM recognized *in a rule-making* context that Congress had *not* delegated to BLM the discretion to allow impairment. The 1979 interim management policy repeatedly noted that BLM's obligation was to preserve the WSA inventory lands for Congress' evaluation: "The final decision on permanent wilderness designation for each wilderness study area belongs to Congress. Management under the non-impairment standard protects Congress' right to make the designation decision by preventing actions that would preempt that decision."[5] 1979 Interim Management Policy,

[4] On the other hand, BLM's view is now and has long been that off-road use can damage WSA and other public land.

[5] In 1982, the Department of Justice confirmed and reinforced BLM's view. *Presidential Authority over Wilderness Areas under the Federal Land Policy and Management Act of 1976,* 6 U.S. Op. Off. Legal Counsel 63 (1982), the Department's counsel concluded that even a

(Continued on following page)

supra, 44 Fed. Reg. at 72015-16 (1979). (The "non-impairment standard" is part of the means by which BLM complies with the non-impairment mandate. *Id.*)

2. Courts Have Long Understood That, with the Non-impairment Duty, Congress Intended BLM to Ensure Against Wilderness Degradation in the Management of WSA's Pending Congressional Disposition.

Given Congress' unmistakable determination to reserve for itself the choice of what lands to designate as wilderness, it is "implausible that Congress would [use] modest words" to delegate to BLM whether to allow impairment. *American Trucking Associations*, 531 U.S. at 468.[6] Until Congress decides what WSA's to designate as wilderness, the federal courts must be ready to determine if there has been impairment and if so order BLM to identify and implement appropriate remedial or preventative measures.

temporary setting-aside of the non-impairment mandate could defeat its purpose. " 'The interim management provision would be frustrated by irreversible disturbances of the status quo.' " *Id.* at 71 (quoting *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972)).

[6] *American Trucking Associations* is instructive here. The non-impairment mandate is undeniably a demanding goal. However, just as Congress can rationally choose to require air pollution control equipment "that might at the time appear to be economically or technologically infeasible," Congress can and did direct BLM to preserve WSA's to Congress' satisfaction. (*Id.* at 491-92) (citations and internal quotations omitted).

Indeed, as a practical matter, federal courts have repeatedly demonstrated that they can determine, in the context of particular actions for particular WSA's, whether BLM management of particular land meets the non-impairment standard, i.e., that the non-impairment mandate provides "a law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971). In *Sierra Club v. Clark*, 774 F.2d 1406, 1408-09 (9th Cir. 1985), for example, the court of appeals did not question that it could readily interpret and apply the requirement from the Interim Management Policy that impacts from a permitted activity "be capable of being reclaimed to a condition substantially unnoticeable in the wilderness area . . . as a whole by the time the Secretary of the Interior is scheduled to send his recommendation to the President." *See also Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988), *overruled on other grounds*, *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992). ("The federal courts are capable of determining whether a WSA has remained 'roadless,' and whether the boundaries of public lands and rights-of-way will be breached. A court can measure whether the improvement of the Burr Trail will 'impair the suitability of [WSA's] for preservation as wilderness . . . .'")

II. FEDERAL COURTS HAVE JURISDICTION TO REVIEW BLM'S NONCOMPLIANCE WITH THE MANDATORY, NONDISCRETIONARY TASKS IN THE BLM LAND USE PLANS.

A. FLPMA and its Implementing Regulations Clearly Require Agencies to Comply with the Mandatory Elements of Land Use Plans.

An agency must obey the rules, regulations, guidelines, and plans that it itself adopts. *Service v. Dulles,* 354 U.S. 363, 372 (1957) (recognizing the right of federal courts to review an agency's actions to ensure that its own regulations have been followed); *Webster v. Doe,* 486 U.S. 592, 602, n.7 (1988). BLM argues, however, that a BLM land use plan can not be a source of mandatory, non-discretionary duties. Similarly Judge McKay, in his dissent below, concluded that BLM's land use plans are merely "aspirational." *SUWA v. Norton,* 301 F.3d 1217, 1245 (10th Cir. 2002) (J.McKay, dissenting in part).

These interpretations contradict the plain language of FLPMA: "The Secretary *shall* manage the public lands . . . in accordance with the land use plans developed by him under section 1712 [of FLPMA]." 43 U.S.C. § 1732(a) (emphasis added). This provision is not ambiguous or subject to multiple interpretations. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). FLPMA permits only one interpretation: provisions in land use plans that are presented as mandates are indeed mandatory, and give the agency only as much discretion as their wording allows.

BLM's own regulations compel the same conclusion. "Future resource management authorizations and actions," "budget or other action proposals," and "subsequent

more detailed or specific planning" must all "conform to the approved plan." 43 C.F.R. § 1610.5-3(a). The definition of "conformance" affirms that BLM's land use plans are binding on an action-specific level. "Conformance . . . means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. § 1601.0-5(b).

B. Land Use Plans Include Mandatory, Non-discretionary Provisions; They are Not Always or Entirely General.

Federal land use planning is becoming "the most critical stage in the overall process for allocating public natural resources." *See, e.g.*, George Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307 (1990).[7] BLM's land use plans may contain *both* general descriptions of future planning efforts, which do not mandate specific tasks, *and* specific elements which do mandate specific tasks. Thus, a land use plan under FLPMA "is not a final implementation decision *on actions which require further specific plans,*

[7] At issue in this case are the land use plans that BLM adopts pursuant to FLPMA, known in BLM's regulations and actions as "Resource Management Plans." 43 C.F.R. § 1601.0-5(k). But, similarly, the National Forest Management Act of 1976 directs the Forest Service to develop and maintain "land and resource management plans," commonly known as forest plans, for the national forests. 16 U.S.C. § 1604(a). As BLM acknowledges in its brief, BLM's land use plans resemble forest plans. BLM Merits Brief, page 43.

process steps, or decisions under specific provisions of law and regulations." 43 C.F.R. 1601.0-5(k) (Emphasis Added). BLM quotes this regulation to the Court to argue that its land use plans can never be final implementation decisions, *see* BLM Merits Brief, pages 41-42, but the better reading of this regulation is that a BLM land use plan *is* a final implementation decision on those actions that do *not* require "further" plans, steps or decisions.

In practice, BLM plans often do mandate specific further actions.[8] The case at bar provides two neat examples of mandatory elements commonly contained in BLM land use plans: 1) a directive to monitor a particular area for off-road vehicle use; and 2) a commitment to create and implement an "ORV implementation plan." *SUWA v. Norton*, 301 F.3d at 1323-24. Each of these elements is an "agency action" for APA purposes, and would typically be included in a land use plan as a nondiscretionary duty. They should be held to be so here.

BLM argues that because it follows a tiered planning protocol, judicial authority to compel compliance with any of the individual tiers of its plans would unduly constrain the management flexibility it needs. This argument is a bald attempt to evade judicial review all together. The tiered planning approach that BLM has adopted is consistent with Congress' direction to BLM to "develop, maintain,

[8] In *Ohio Forestry Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998), the Court ruled only that the particular forest plan provisions that the Sierra Club had challenged in the court below did not "command anyone to do anything or to refrain from doing anything." The Court never suggested plan provisions could not include specific commandments that could be enforceable or voidable. *See Id.* at 738.

and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 43 U.S.C. § 1712(a). Yet that direction does not support BLM's extraordinary suggestion that each tier is pure "plan," all theoretical and with no commitment to action. This suggestion is not correct and should not be correct. Just as the most detailed, bottom-level plans will likely include general statements of future intention, a top level plan may include specific enforceable commitments to action. Congress has compelled BLM to adopt land use plans; *Amici* States urge the Court to rule that the federal courts have jurisdiction to compel BLM to comply with any definitive commitment in any of its land use plans. To rule otherwise would be to create an exception to the rule that an agency must follow its own plans and regulations.

Acceptance of BLM's construction of its obligation to comply with duties spelled out in land use plans would be tantamount to surrender of judicial authority to compel BLM to comply with the congressional mandate to follow a logical plan course. BLM, and perhaps other federal agencies, would be free to adopt plans that include specific commitments and promises without any fear that they could be held to those commitments and promises. If compliance by an agency with a plan that it has written and duly adopted with notice-and-comment procedures is made unreviewable and, therefore, unenforceable, the statutory provisions that the plan was mandated to carry out will be effectively written out of the law. Congress directed BLM to prepare and follow land use plans and any failure by BLM to do so is and should be reviewable by the federal courts.

C. Access to the Federal Courts Is Essential If States Are to Have Meaningful Recourse When Federal Agencies Neglect Their Obligations Respecting Land Management.

The proper management of federal land is of critical importance to the States' environmental and economic health. To give just one example, water, as is well-known, is the critical commodity in the West. The Forest Service has observed that, although twenty percent of the State of California is owned by the Forest Service, almost *half* of the rainfall that flows into California's rivers falls first onto national forest land. USDA, Forest Service, Pacific Southwest Branch, *National Forests and California's Water*. http://www.fs.fed.us/r5/publications/water_resources/ (last visited January 12, 2004). How the Forest Service manages those national forests has a very significant effect on the quality and availability of that run-off. In the words of the Forest Service: "Proper ecosystem management is essential for the health of our watersheds." *Id.* at "Forest Management." The management choices that the Forest Service makes through its planning process may have substantial implications for this vital source of water. Although California and the other States anticipate cooperative working relationships with the federal land agencies, and despite the importance of proper management of federal lands to the States, it has been suggested that the States and the federal agencies are not equal partners in that relationship. *See, e.g., Granite Rock v. California Coastal Commission*, 480 U.S. 572, 596 (1987) (Justice Powell, dissenting in part) ("Significantly, the FLPMA only requires the Secretary to listen to the States, not obey them.")

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and

Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. "This Court has repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Granite Rock v. California Coastal Commission*, 480 U.S. at 580. Though the Property Clause does not itself preempt state law on federal land, with the Supremacy Clause, it gives Congress plenary power to do so. When Congress enacts legislation respecting federal public lands, that legislation "'necessarily overrides conflicting state laws under the Supremacy Clause.'" *Id.* at 580-81 (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539, (1976)).

The actual scope of preemption of state authority on federal land depends on the particular provisions of the federal law and regulations in question. In *Granite Rock*, the Court held that the Forest Service regulations in question did not demonstrate "an intention to preempt all state regulation of unpatented mining claims in national forests." *Id.* at 584. The Court further assumed "*without deciding this issue* . . . that the combination of the [National Forest Management Act] and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." *Id.* at 585. (Emphasis Added).

FLPMA does not preempt all state land use planning on BLM public lands. Nevertheless, it cannot be gainsaid that preemption is a possibility and that state sovereignty is thereby diminished on federal land. "[E]ven within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law. . . ." *Id.* at 593. In those instances where states cannot exercise their own sovereign powers on federal

lands, the states must have recourse to the federal courts should a federal land use agency not comply with mandatory, non-discretionary provisions of its own plans or regulations. To return to the example of the national forests in California, through the forest planning process, the Forest Service makes important commitments about its land-use planning. Nevertheless, under BLM's proposed rule, were the Forest Service later to refuse to implement those commitments, California would have no recourse in the federal courts. In effect, California would be a "mere province[] or political corporation[], instead of a coequal sovereign[] entitled to the same dignity and respect." *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 124 S.Ct. 983 (January 21, 2004) (J. Kennedy dissenting).

III. THE FEDERAL COURTS HAVE JURISDICTION TO DETERMINE IF BLM HAS COMPLIED WITH NEPA'S "HARD LOOK" DOCTRINE IN UNFINISHED PROGRAMS, INCLUDING ONGOING PLANNING PROJECTS.

As is the case with respect to BLM's duty to comply with its own land use plans, the federal courts are also the States' only meaningful recourse should BLM fail to comply with its ongoing obligations under NEPA. If federal courts do not have such jurisdiction, BLM could change its land use plans, eliminate WSA protections, or refuse to update its plans regardless of on-the-ground changes that made the plans obsolete – all without NEPA compliance. Indeed, BLM could refuse even to examine evidence bearing on whether or not the plans need updating, regardless of changing circumstances. Not only does BLM need the information that a NEPA review provides, the

States need that information to perform their own planning and regulatory functions. *Robertson v. Methow Valley*, 490 U.S. 332, 349, 352 (1989).

BLM's duty to comply with NEPA's "hard look" requirement is related to, but distinct from, the other two duties discussed in this case. BLM must maintain land use plans both for Wilderness Study Areas and other lands under its control. In either case, changing circumstances may render a previous land use plan inadequate. *Amici* States agree with BLM that these federal land use plans are dynamic documents that must evolve as circumstances and BLM's knowledge changes. It is *because* the plans are dynamic and must change that NEPA continues to apply to BLM's planning process.

The case at bar demonstrates neatly why federal land agencies must update their plans in response to changed circumstances and why NEPA pertains to that obligation. Increasing off-highway vehicle use threatens the wilderness values and other natural values of Utah's public lands. BLM has many tools to reduce off-highway vehicle use and to mitigate the damage from that use. However, those tools cannot prevent or mitigate any damage unless BLM employs them, and BLM will not do so unless it is first aware of the increased need for those tools. The NEPA process provides the information to support such awareness.

In *Marsh v. Oregon Natural Resources Commission*, 490 U.S. 360, 370-71 (1989), this Court determined that the preparation of "postdecision supplemental environmental impact statements" is "at times necessary to satisfy [NEPA's] 'action-forcing' purpose." That rule applies in uncompleted projects such as ongoing planning projects.

As Senator Jackson noted, Congress intended NEPA to be "infused into the ongoing programs and actions of the Federal Government." (Quoted at *Id.* at 371, n.14.)

Just as there is no dispute that off-highway vehicle use can damage environmentally fragile land, so there is no dispute that the use of off-highway or off-road vehicles on public lands administered by BLM "has increased substantially in recent years." BLM, *National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands* (2001). A series of reports from the federal government has documented the damage that off-highway vehicle use causes on public lands. General Accounting Office, *FEDERAL LANDS, Information on the Use and Impact of Off-Highway Vehicles,* 2-4 (1995) and references cited therein. The increased use of off-highway vehicles and the damage to land, wildlife and other recreation opportunities caused by the increased use has led the Western States, as well as federal agencies, to adopt programs to regulate and restrict the use of ORVs. *See, e.g.*, California State Parks, Taking the High Road, the Future of California's Off-Highway Vehicle Program (2001). (http://ohv.parks.ca.gov/pages/1140/files/Taking%20the%20High%20Road.pdf, last visited February 4, 2004.)

It is important to clarify, as did the Tenth Circuit in its unanimous decision on this point, that Plaintiffs are not seeking to compel BLM to prepare a supplemental environmental impact statement. Rather, Plaintiffs seek only to compel BLM to "take a hard look at the proffered evidence."

CONCLUSION

Amici States respectfully urge the Court to affirm the judgment of the Tenth Circuit.

Respectfully submitted,

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